APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 101,557

[Filed February 5, 2007]

PUBLIC SERVICE COMPANY OF OKLAHOMA, Plaintiff/Appellee,	)
v.	)
B. WILLIS, C.P.A., INC., Defendant/Appellant.	)

ORDER DENYING CERTIORARI AND APPROVING COURT OF CIVIL APPEALS OPINION FOR PUBLICATION AND ACCORDED PRECEDENTIAL VALUE

PART I

¶1 Now before the Court is the Petition for Writ of Certiorari of Appellees. After review thereof the Petition is denied.

PART II

¶2 The opinion of the Court of Civil Appeals, Division (II), by John F. Fischer, J., rendered on September 19, 2006, pursuant to 20 O.S. 2001, § 30.5, is approved for publication in the official reporter and therefore accorded precedential value.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 5TH DAY OF FEBRUARY, 2007

/s/ James E. Edmondson
Vice Chief Justice

¶3 WINCHESTER, C.J., EDMONDSON, V.C.J., LAVENDER, HARGRAVE, KAUGER, WATT, TAYLOR and COLBERT, JJ., concur.

¶4 OPALA, J., dissents

APPENDIX B

IN THE COURT OF CIVIL APPEALS
OF OKLAHOMA
DIVISION II

Case Number: 101,557

[Filed September 19, 2006]

PUBLIC SERVICE COMPANY OF OKLAHOMA, Plaintiff/Appellee,	)
vs.	)
B. WILLIS, C.P.A., INC., Defendant/Appellant.	)

APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY, OKLAHOMA

HONORABLE JAMES D. GOODPASTER,
TRIAL JUDGE

AFFIRMED

Stratton Taylor
Mark H. Ramsey
Clinton D. Russell
TAYLOR, BURRAGE, FOSTER,
MALLETT, DOWNS & RAMSEY
Claremore, Oklahoma For Plaintiff/Appellee

William T. Dickson,
Tulsa, Oklahoma For Defendant/Appellant.

JOHN F. FISCHER, JUDGE. WISEMAN, P.J., and GOODMAN, J., concur.

OPINION BY: JOHN F. FISCHER, JUDGE:

¶1 Defendant, B. Willis, C.P.A., Inc. (Willis), appeals from an appealable final order of the Trial Court denying Willis's Motion to Dismiss and overruling his Objection and Amended Objection to the Report of Commissioners in a condemnation proceeding brought by Public Service Company of Oklahoma (PSO) to gain an easement to Willis's property for the construction of a railroad. Based on our review of the record on appeal and applicable law, we affirm.

BACKGROUND FACTS

¶2 PSO commenced this condemnation proceeding in 1992 to acquire an easement across property owned by Willis, for the purpose of building a thirteen-mile railroad spur to transport coal to its Oologah power plant. In its petition, PSO alleged that it is a public service corporation duly authorized under 66 O.S. 1991 §§ 51-60 and 27 O.S. 1991 § 7,[1] to exercise the

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[1] Hereafter, unless otherwise noted, we will cite to the current version of the statutes.

power of eminent domain, that its acquisition of Willis's property is necessary for a public purpose and that its efforts to secure the right-of-way by private purchase had been unsuccessful.

¶3 Commissioners were appointed and filed their report pursuant to 66 O.S. 2001 § 53. PSO paid the award into court on December 28, 1992, the same day the report was filed. Willis filed exceptions to the Commissioners' report as permitted by section 55, and alleged that the proposed taking of his property was not for a public use or reasonably necessary therefor and demanded a jury trial. The Trial Court held in favor of PSO and Willis commenced the first of numerous appeals in various state and federal tribunals and, some of which, continue as of the date of this opinion.

¶4 In June 1997, the Oklahoma Supreme Court issued an opinion concluding that Willis was wrongfully denied a fair opportunity to challenge PSO's "asserted but unproven right to take his property as well as the right to conduct discovery," and reversed and remanded for further proceedings. *Pub. Serv. Co. of Okla. v. B. Willis, C.P.A., Inc.*, 1997 OK 78, ¶21, 941 P.2d 995, 1000 (Willis I). Pursuant to that direction and after further proceedings and discovery, on October 14, 2004, the Trial Court conducted a hearing on Willis's motion to dismiss and his exception and amended exception to the Report of the Commissioners. On November 15, 2004, the Trial Court entered its order finding that PSO had established that its condemnation of Willis's property was

for a public use and overruled Willis's motion to dismiss and exceptions.[2] Willis again appeals.

¶5 In his brief-in-chief, Willis asserts four propositions for review:[3] (1) His property cannot be valued until PSO establishes its right to condemn, and the Supreme Court's 1997 reversal in Willis I established, as a matter of law, that PSO trespassed when it constructed the railway spur on his property; (2) The Trial Court was without jurisdiction to enter the 2004 Order because federal law preempted any exercise of State law; (3) The condemnation should be set aside because PSO engaged in fraud, abuse and oppression; and (4) A new appraisal of the condemned property should be ordered.

STANDARD OF REVIEW

¶6 The standard of review for condemnation proceedings is well established. As noted by the Court in Willis I, condemnation proceedings involve both factual determinations and legal rulings. "The necessity, expediency and propriety of exercising the power of eminent domain are questions of general public policy and are governed by statute." *Willis* at ¶20, 941 P.2d at 1000. "Whether it is necessary to take particular property for the economic and efficient accomplishment of a lawful public purpose is a question of fact to be determined from the attendant facts and

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[2] Still pending before the Trial Court at the time of this appeal is Willis's demand for jury trial regarding the value of his property taken by PSO.

[3] Allegations of error set forth in the petition in error but not briefed by the appellant are deemed waived. *Oklahoma City Urban Renewal Auth., v. City of Oklahoma City,* 2005 OK 2, 110 P.3d 550, n.9, 2005 OK 2, 110 P.3d 550, 554 n.9.

circumstances developed by the evidence." *Id.* at ¶18, 941 P.2d at 1000.

¶7 "Under our constitutional provisions and cases interpreting them, the issue of whether a proposed taking is for a 'public use' is a judicial question." *Id.* at ¶19, 941 P.2d at 1000 (citing *McCrady v. Western Farmers Elec. Coop.*, 1958 OK 43, 323 P.2d 356). *See also Sublett v. City of Tulsa,* 1965 OK 78, ¶34, 405 P.2d 185, 196; *Arthur v. Bd. of Comm'rs of Choctaw County,* 1914 OK 181, 43 Okla. 174, 141 P. 1.

¶8 "A valid declaration of necessity by the appropriate body will be viewed as conclusive by the courts in the absence of a showing of actual fraud, bad faith, or an abuse of discretion by the condemning authority." *Willis* at ¶20, 941 P.2d at 1000, (citing *Rueb v. Oklahoma City,* 1967 OK 233, 435 P.2d 139)).[4] "The findings of the trial court on the issue of the necessity of the taking will not be disturbed on appeal where there is evidence to support such findings." *Id.* at ¶18, 941 P.2d at 1000, (citing *City of Tulsa v. Williams,* 1924 OK 136, 100 Okla. 116, 227 P. 876).

DISCUSSION

¶9 The power of eminent domain lies dormant with the State "until such time as the Legislature by specific enactment delineates the manner and through whom it may be

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[4] The value of the condemned property is also a question of fact and, at the request of the land owner, may be tried to a jury. Okla. Const. art. 2, § 24; 66 O.S. 2001 § 55. Willis's exceptions to the award of the Commissioners was tried to the Court, and Willis does not claim in this appeal that he properly requested but was denied a jury trial on that issue.

exercised." *City of Tahlequah v. Lake Region Elec. Coop., Inc.*, 2002 OK 2 ¶7, 47 P.3d 467, 471 (footnote omitted). *See also City of Pryor Creek v. Pub. Serv. Co. of Okla.*, 1975 OK 81 ¶9, 536 P.2d 343, 345-46. Condemnation is a proceeding strictly controlled by the Constitution and statues prescribed by the Legislature. *Willis* at ¶16, 941 P.2d at 999.

¶10 Any governmental body subordinate to the State, which would include PSO (17 O.S. 2001 § 151(c)), may not exercise a power of eminent domain in the absence of statutory authority. *Bd. of County Comm'rs of Muskogee County v. Lowery*, 2006 OK 31, ¶10, 136 P.3d 639, 646. The Legislature has authorized PSO to, and specified the manner in which PSO may, exercise the power of eminent domain. Any corporation licensed to do business in Oklahoma to furnish electricity[5] is granted the same power of eminent domain as that granted to railroads. 27 O.S. 2001 § 7; 66 O.S. 2001 § 57.

¶11 The procedure by which railroads are authorized to exercise the power of eminent domain has been established by the Legislature. 66 O.S. 2001 §§ 51-60. Superimposed on this statutory procedure are the constitutional limitations of Sections 23 and 24 of Article II of the Oklahoma Constitution, *Allen v. Transok Pipe Line Co.*, 1976 OK 53, ¶12, 552 P.2d 375, 379, and the appropriate provisions of the United States Constitution. Okla. Const. art. 1, § 1.

¶12 When interpreting the relevant taking authority, we are guided by the longstanding general rule of strict statutory

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[5] According to the Trial Court's findings, unchallenged by Willis in this appeal, PSO is licensed to do business in Oklahoma for the purpose of generating electricity.

construction applicable to eminent domain statutes. *City of Cushing v. Gillespie,* 1953 OK 121, 208 Okla. 359, 256 P.2d 418. In addition, we generally construe our state constitutional eminent domain provisions strictly, in favor of the owner and against the condemning party. *Stinchcomb v. Oklahoma City,* 1921 OK 154, ¶0, 81 Okla. 250, 198 P. 508, 508 (Syllabus 1 by the Court). The issues raised by Willis in this appeal are to be resolved within the framework of these legal principles.

PROPOSITION I

¶13 In Proposition I, Willis challenges the Trial Court's November 2004 Order, principally because he contends the "date of take" used for the valuation of his property was in error. He comes to this conclusion by arguing that although his property was valued as of December 28, 1992, the date the Commissioners filed their Report, PSO's right to condemn was not established until November 15, 2004, when the Trial Court entered the order that is the subject of this appeal. From this, he concludes not only that the date of valuation was six years premature, but also that until PSO's right to condemn was established, PSO was a trespasser on his property when it constructed the rail spur.[6] Willis misinterprets the effect of the Supreme Court's ruling in Willis I.

¶14 Following the filing of PSO's 1992 Petition for Condemnation, the Trial Court appointed commissioners

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[6] Willis extends this argument to support his claim of ownership of the portion of the rail spur crossing his property but has neither sought nor preserved for appeal any ruling of the Trial Court addressing this issue. Therefore, we are not required to consider this argument. Okla. Sup. Ct. R. 1.26, 12 O.S. 2001, ch. 15, app. 1.

pursuant to 66 O.S. 2001 § 53 to value the portion of Willis's property that PSO was seeking to condemn. The Commissioners' Report was filed with the Trial Court on December 28, 1992 and PSO paid the amount of the award to the Court Clerk on that date. The payment of that award authorized PSO to enter onto Willis's property to construct its rail spur regardless of Willis's subsequent appeal. 66 O.S. 2001 § 56. Payment to the Court Clerk in lieu of payment to the owner is a procedure authorized not only by statute, but also by the Oklahoma Constitution. Okla. Const. art. 2, § 24. The Trial Court held a hearing on January 27, 1994, to determine PSO's right to take Willis's property in light of his exceptions to the Commissioners' Report. Some twelve years later, that issue remains before this Court.

¶15 The Oklahoma Supreme Court's decision in Willis I established only that Willis had been "denied an opportunity to challenge PSO's asserted but unproven right to take his property" in the 1994 hearing. *Willis* at ¶21, 941 P.2d at 1000. Pursuant to the direction of the Oklahoma Supreme Court, the Trial Court provided Willis that opportunity. In this appeal, Willis does not contend that the Trial Court failed to provide the relief ordered in Willis I. He argues only that the Trial Court reached the wrong result.

¶16 In its order of November 15, 2004, the Trial Court found that PSO had established its right to condemn Willis's property. Consequently, the right to condemn Willis's property first "asserted" by PSO in its 1992 petition was ultimately "proven" to the satisfaction of the Trial Court at the hearing on October 14, 2004. "The findings of the trial court on the issue of necessity of the taking will not be disturbed on appeal where there is evidence to support such findings." *Id.* at ¶18, 941 P.2d at 1000.

¶17 There is nothing in the Oklahoma Constitution, the applicable condemnation statutes or Willis's submissions in this appeal that precludes the establishment of the right to condemn at a date subsequent to the date the condemned property is valued. That is, in fact, the required procedure. Within thirty days after a commissioners' report is filed, an aggrieved party may file exceptions to the report and/or within sixty days request a jury trial on the amount of the award. 66 O.S. 2001 § 55. This procedure offers Willis an opportunity to challenge both PSO's right to take his property and the value of his condemned property as determined by the Commissioners.

¶18 Further, we note that Willis has obtained a determination from the United States Court of Appeals for the Tenth Circuit that the United States Constitution does not require pre-taking compensation. *B. Willis, C.P.A., Inc. v. Pub. Serv. Co. of Okla.*, No. 97-5107, 182 F.3d 931 (Table), 1999 WL 335207 (10th Cir. May 27, 1999), *cert. denied*, 528 U.S. 1003, 120 S. Ct. 496 (1999).[7] As in this case, Willis

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[7] In resolving the federal issue, the Tenth Circuit, in an unpublished opinion, determined that the United States Constitution does not require pre-taking compensation if the State provides a reasonable and adequate provision for obtaining compensation after the taking. Citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), and *Biddison v. City of Chicago*, 921 F.2d 724, 727 n.4 (7th Cir. 1991), the Tenth Circuit found that Oklahoma's eminent domain procedures are not "complete" until (1) the condemnor's right to take is finally resolved and (2) the amount of the condemnation award is determined. Because determination of the award generally occurs after the condemnor has taken possession, any failure by the State to provide adequate compensation can only be determined after the

argued to the Tenth Circuit that PSO was not entitled to possession of his property until its right to condemnation had been finally determined, citing *Town of Ames v. Wybrant,* 1950 OK 197, 203 Okla. 307, 220 P.2d 693, to support that argument. The Tenth Circuit did not find *Wybrant* to be inconsistent with other Oklahoma Supreme Court cases uniformly accepting the pre-taking procedure authorized by section 53(C). We come to the same conclusion as the federal court. *Wybrant* does not hold that section 53(C) is unconstitutional.

¶19 Oklahoma's eminent domain statutes are consistent and coherent. They provide Willis a right to appeal the condemnation before final determination of all the issues that may be raised in the Trial Court without the requirement of posting a bond.[8] The same statutes provide PSO a right to take at least temporary possession[9] of the condemned property on payment of the condemnation award. This legislative program ensures that public works on condemned property can continue[10] subject to judicial review and without prejudice to

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taking and only at that point would any federal issue be ripe for review. *B. Willis, C.P.A., Inc. v. Pub. Serv. Co. of Okla.,* No. 97-5107, slip op. at 3, 182 F.3d 931 (Table), 1999 WL 335207 (10th Cir. May 27, 1999), *cert. denied,* 528 U.S. 1003, 120 S. Ct. 496 (1999).

[8] Okla. Const. art. 2, § 24.

[9] As discussed in Proposition IV, a condemnor who takes possession of condemned prop rty proceeds at its own risk until a final non-appealable judgment confirming its right to condemn the property has been entered. The statutory system in this State permits the condemnor to take that risk if it so chooses.

[10] 66 O.S. 2001 § 56.

the condemnee's right to raise any issue in that review. This system is not inconsistent with the Oklahoma Constitution, and, as noted by the Tenth Circuit, it is permitted by the United States Constitution.

¶20 We find that there is sufficient evidence to support the Trial Court's finding that PSO was entitled to take Willis's property for the purpose of constructing a rail spur and that the Trial Court's ruling that this constituted a public use justifying condemnation is correct as a matter of law. Willis's argument that the value of his property must be determined as of the date of the Trial Court's order determining PSO's right to take that property is not supported by law.

¶21 Just as the necessity of taking under eminent domain must be "determined by conditions existing at the time of the taking," *Willis* at ¶18, 941 P.2d at 1000, so also the value of the taken property can only be determined as of the time of the taking. Willis confuses PSO's taking of his property with the confirmation of that right by the Trial Court. The Trial Court correctly determined, as a matter of law, that Willis's property should be valued as of the date the Commissioners completed their valuation, and the Court Clerk properly filed and recorded their Report. 66 O.S. 2001 § 53(C). Based on this valuation, the date PSO took Willis's property is determined by the date PSO paid the Commissioner's award. *State ex rel. Dept. of Transp. v. Post*, 2005 OK 69, 125 P.3d 1183.

PROPOSITION II

¶22 Willis next argues that the Trial Court was without jurisdiction to enter its November 2004 Order because federal regulation of railroads preempts any assertion of State authority over the rail spur constructed by PSO. This

argument is precluded by an adverse ruling Willis obtained from the Surface Transportation Board (STB).

¶23 On February 15, 2001, Willis filed a Petition for Declaratory Order with the STB asking it to declare that PSO's rail spur had been improperly constructed because PSO had not first obtained authority from the STB to construct that spur. Willis's Petition was denied by Order dated October 1, 2001, in which the STB found that, while it had jurisdiction over transportation by a rail carrier, PSO was not a rail carrier. The STB concluded that in its construction and operation of the spur, PSO was not subject to the STB's jurisdiction because the spur was a private track. *B. Willis, C.P.A., Inc. Petition for Declaratory Order,* 2001 WL 1168090 (S.T.B. Oct. 16, 2001) (No. 34013).

¶24 Willis sought to reopen this decision in June of 2002. The STB concluded that the "new" evidence Willis sought to introduce was neither new nor previously unavailable to Willis and that, regardless, the newly proffered evidence did not lead to any different conclusion than the STB had reached in October of 2001:

> Thus, as the October 2001 decision correctly concluded (at 4), where, as here, "a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires ICC or Board authorization or approval."

B. Willis, C.P.A., Inc. - Petition for Declaratory Order, 2002 WL 1730018 (S.T.B. July 23, 2002) (No. 34013).

¶25 Unsatisfied, Willis appealed the STB's decision to the United States Court of Appeals for the D.C. Circuit, which affirmed in an unpublished opinion finding that the STB did not have jurisdiction over the Willis/PSO dispute. *B. Willis, C.P.A., v. Surface Transp. Bd.*, 51 Fed. Appx. 321, 51 F.App'x 321 (D.C. Cir. 2002). The D.C. Circuit denied Willis's petition for rehearing and petition for rehearing *en banc* and the United States Supreme Court denied certiorari. *B. Willis, C.P.A., Inc., v. Surface Transp. Bd.*, 540 U.S. 811, 124 S. Ct. 51, 157 L. Ed. 2d 23 (2003). Willis has had his day in court on this issue. He may not be satisfied with the result, but he is, nonetheless, bound thereby and may not re-litigate the findings of the STB in the courts of Oklahoma. *Constant v. U.S.*, 929 F.2d 654, 657 (Fed. Cir. 1991); *Nat'l Diversified Bus. Servs., Inc. v. Corp. Fin. Opportunities, Inc.*, 1997 OK 36, 946 P.2d 662. Absent federal jurisdiction over PSO in its construction and operation of this rail spur, there is no basis for federal preemption of the proceedings in the Trial Court.

PROPOSITION III

¶26 Willis next argues that the Trial Court should have found that PSO had engaged in fraud and abuse and oppression, and should have refused to confirm PSO's exercise of its eminent domain power on that basis. To advance this argument, Willis asserts that PSO did not have authority as a public utility to cross a public road, street or highway. Willis does not argue that any "public road, street or highway" crossed by PSO is located on his property. The issue before the Trial Court, and in this appeal, is PSO's right to condemn Willis's property. The Trial Court's determination that, as a matter of law, PSO had the power of eminent domain to condemn Willis's property is correct. 27 O.S. 2001 § 7; 66 O.S. 2001 § 57; *Tuttle v. Jefferson Power*

& Improvement Co., 1912 OK 232, 31 Okla. 710, 122 P. 1102. Willis has pointed to no representation by PSO that fraudulently enabled it to use the power of eminent domain granted to it by the Legislature.

¶27 Willis's assertion of oppression by PSO is equally unpersuasive. Although it took, as Willis notes, seven years and an appeal to the Oklahoma Supreme Court, Willis recognizes, in his brief-in-chief, that he was permitted to conduct discovery and "afforded a hearing [on] October 14, 2004." He points to no defect in that proceeding that affected his constitutional right to challenge PSO's condemnation of his property. As noted above, there is ample evidence in the record to support the Trial Court's conclusion that PSO had lawfully exercised its power of eminent domain in condemning Willis's property. Consequently, we are required to leave that decision undisturbed on appeal. *Willis* at ¶18, 941 P.2d at 1000.

PROPOSITION IV

¶28 Willis includes five separate arguments in support of his final proposition that a new appraisal should be ordered: (1) The Commissioners in this case were selected by PSO and not the Trial Court as required by 66 O.S. 2001 § 53; (2) The instructions to the Commissioners wrongfully precluded them from considering information from the landowners; (3) The Commissioners failed to value only the easement being condemned by PSO; (4) The Commissioners failed to consider the value of coal, limestone and topsoil removed from Willis's property by PSO during construction of its rail spur; and (5) The Commissioners' Report fails to consider the value of the rail spur bridge constructed on Willis's property, which he claims ownership of by virtue of Willis I.

¶29 The Trial Court considered Willis's challenge to the manner in which the Commissioners were appointed and rejected Willis's argument in its Order of November 14, 2004. There is sufficient evidence in the record to support the Trial Court's finding on this issue and it will not, therefore, be disturbed on appeal. *Willis* at ¶18, 941 P.2d at 1000.

¶30 As PSO correctly points out, the issue before the Trial Court at the October 2004 hearing was PSO's right to condemn Willis's property, not the value of the property condemned. Based on the record before this Court, the Trial Court has yet to reach the second issue. Consequently, at the time of this appeal, there was no judgment or appealable order that would be relevant concerning arguments two through four of Willis's Proposition IV. Those arguments were premature in the Trial Court proceedings from which this appeal was taken and need not be considered here.

¶31 Willis's final argument in Proposition IV is a variation of the argument asserted in Proposition I and dependent on his misinterpretation of the effect of Willis I. The Trial Court's 1992 Order was a final, appealable order. 12 O.S. 2001 § 953. Willis was entitled to appeal from that Order and could have stayed the effect of that Order by posting a bond, 12 O.S. 2001 § 990.4, but he was not required to do so. Okla. Const. art. 2, § 24; 66 O.S. 2001 § 56. Nonetheless, Willis's appeal, without posting a bond, did not "delay the prosecution of the work." 66 O.S. 2001 § 56.

¶32 PSO was entitled to rely on the Trial Court's Order and construct its rail spur. Until reversed on appeal, the Order of the Trial Court was presumed correct. *Hamid v. Sew Original,* 1982 OK 46, ¶¶6-7, 645 P.2d 496, 497. And Willis's appeal did not stay or suspend the effectiveness of that Order, particularly in light of the authority to proceed

with the work granted in section 56. *Davis v. Rowland,* 1952 OK 144, ¶5, 207 Okla. 19, 246 P.2d 376, 377. PSO could have proceeded with the work at its own risk until its "asserted" right to condemn was "proven" to the satisfaction of the Trial Court and recorded in a final non-appealable judgment. The authorities cited by Willis clearly support his argument on this point. Just as clearly, however, PSO was not prevented by law from taking that risk. The Trial Court has now confirmed PSO's right to condemn Willis's property and construct a rail spur with any necessary bridges. We affirm that ruling.

CONCLUSION

¶33 There is sufficient evidence in the record to support the Trial Court's finding that PSO's taking was for a public purpose as well as for its refusal to set aside that finding based on Willis's claims of fraud, abuse and oppression, and irregularity in the appointment of the Commissioners. The exercise of jurisdiction by the Trial Court was not preempted by federal law. The Trial Court's confirmation of PSO's exercise of its power of eminent domain was correct as a matter of law, and we affirm.

¶34 AFFIRMED.

WISEMAN, P.J., and GOODMAN, J., concur.

September 19, 2006

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 97-5107
(D.C. No. 96-CV-59-E)
(N.D. Okla.)

[Filed May 27, 1999]

B. WILLIS, C.P.A., INC., Plaintiff-Appellant,	)
v.	)
PUBLIC SERVICE COMPANY OF OKLAHOMA, AN OKLAHOMA CORPORATION; BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, A FOREIGN CORPORATION, Defendants-Appellees.	)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and

Before TACHA and BALDOCK, Circuit Judges, and GREENE,** Senior District Judge.

The panel previously abated this appeal in deference to related state court eminent domain proceedings which might have obviated or perhaps clarified some of the issues raised in the case. However, timely resolution of the state action has not ensued. After making its way through the Oklahoma appellate courts, that proceeding is now back in the trial court awaiting redetermination.

Upon further review of the record on appeal, the briefs, and the parties' subsequent submissions, the panel concludes that proper grounds for immediate disposition of the appeal are present but have been obscured by the presence of many overlapping/redundant claims which are not ripe for adjudication. For reasons explained below, we affirm the decision of the district court, though we clarify that the dismissal of the bulk of this case, which is dictated by constitutional constraints on subject matter jurisdiction, is without prejudice.

Background

Oklahoma's statutory scheme for eminent domain, Okla. Stat. Ann. tit 66, §§ 51-66, authorizes railroad corporations (and utilities, *see* Okla. Stat. Ann. tit 27, § 7) to take real property by condemnation, The procedure may be outlined in pertinent part by the following steps: (1) the condemnor

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judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** Honorable J. Thomas Greene, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

corporation applies to the district judge, with notice to the landowner, for selection of a three-person commission; (2) the commissioners inspect the property, assess just compensation for the injury involved, and file a report with the clerk of the court, which is promptly forwarded to interested parties; (3) if the condemnor pays the assessed sum, it may take immediate possession consistent with its proposed use, though all parties retain the right to challenge the commission's report; (4) review may be sought in the district court by filing written exceptions to the report or a demand for jury trial; (5) the district court's final judgment (approving compensation or denying condemnation) is subject to appeal, but such review shall not delay the condemnor's use of the Property if approved, so long as the assessed compensation has been paid.

Defendant Public Service Company of Oklahoma (PSO) commenced an eminent domain proceeding to condemn and acquire an easement over plaintiff's property to build a railroad spur for transporting coal to one of its power plants. After the first three steps of the process were concluded, plaintiff sought review in state court both by exception and jury demand, alleging that the proposed taking was not for a public use nor reasonably necessary for the use claimed. Plaintiff also challenged the amount of compensation assessed. The trial court ruled in favor of PSO, and plaintiff appealed. He also sought interim equitable relief from the Oklahoma Supreme Court, which denied his requests. While the appeal was pending, PSO completed the railroad spur and put it in use (particularly by defendant Burlington Northern Railroad Company (BN), as PSO's licensee). When plaintiff threatened to interfere with the operation, PSO obtained an injunction against him. Ultimately, the Oklahoma Supreme Court reversed the judgment of condemnation, holding that the trial court had erroneously relieved PSO of the initial burden of

proof and compounded that error by denying plaintiff discovery of pertinent materials. *See Public Serv. Co, v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997). On remand, the state trial court refused to dissolve the existing injunction against plaintiff's interference with PSO's operation, and the Oklahoma appellate courts have affirmed that ruling. However, the trial court has yet to issue any final decision on the merits of the condemnation.

In the meantime, plaintiff filed these proceedings in federal district court, alleging numerous Constitutional claims against PSC under 42 U.S.C. § 1983 and a trespass claim against BN. The district court identified the crux of the case to be plaintiff's assertion that he was constitutionally entitled to a final judicial determination on condemnation before PSO could take possession of the easement over his property. In the district court's view, no federal right was implicated under the circumstances and, consequently, PSO's current possession, and BN's licensed use, was not actionable.

On this appeal, plaintiff continues to argue that the state condemnation proceedings are constitutionally invalid, violating his rights to due process, equal protection, access to the courts, and free speech. He also claims that, as PSO could not have acquired a valid right to possession through such proceedings, BN has no derivative licensee defense to the trespass claim. Finally, he contends that the state court order, enjoining his interference with PSO's operations violates his First Amendment right of free speech. We conclude that most of these claims are not ripe for adjudication, and the remainder lack merit. Accordingly, we affirm the district court's decision dismissing, the case.

Ripeness

Virtually all of plaintiff's complaints derive, in one way or another, from the eminent domain proceeding prosecuted by PSO. As outlined above, that proceeding affords plaintiff the right to challenge both the justification of PSO's taking and the adequacy of any resulting compensation. *See generally* Okla. Stat. Ann. tit 66, §§ 51-57. Thus, until that proceeding is concluded, any objections he may have cognizable under the most directly pertinent provision of the federal Constitution--the Just Compensation Clause (JCC)--are not ripe for adjudication and must be dismissed for lack of subject matter jurisdiction under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-96 (1985). More to the point here, this ripeness rule encompasses other constitutional claims which fall squarely within the primary purview of the JCC in this context, such as the due process, equal protection, and access-to-courts infirmities plaintiff alleges with respect to the state eminent domain proceeding. *See Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (collecting numerous Tenth Circuit cases). Thus, pursuit of such closely-related objections must await the ripening of the predominant JCC claim. *Id.*

However, one condemnation-related claim here clearly falls outside the *Williamson* bar. In addition to the objections to his own proceeding, plaintiff appears to raise a generalized facial challenge to the state eminent domain scheme itself, for permitting any condemnor to take immediate possession upon payment of an administratively-determined compensation before final judicial resolution of the landowner's objections, *see* Okla. Stat. Ann. tit 66, § 53(C). While an objection to the taking "as applied to [plaintiff's] property would be unripe [under Williamson]," such a "facial challenge to the [statutory

scheme]" is immediately adjudicable. *See Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992).

This evidently was, in fact, the claim addressed by the district court, which held that predeprivation hearings are not constitutionally required in the eminent domain context. We agree. In addition to the authorities the district court discussed, we note the Supreme Court specifically stated in Williamson that "[u]nlike the Due Process Clause... the Just Compensation Clause has never been held to require pretaking process or compensation." *Williamson*, 473 U.S. at 195 n. 14 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)); *see also J. B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309 & n.4 (10th Cir. 1992) (quoting *Williamson* and rejecting due process Claim based on asserted need for pretaking hearing in this context as "impos[ing] new and potentially inconsistent obligations" beyond those required by JCC), Indeed, this was a premise for the *Williamson* Court's ripeness analysis: "[B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking," *Williamson*, 473 U.S. at 195; *see also Biddison v. City of Chicago*, 921 F.2d 724, 727 n.4 (7th Cir, 1991).

This point is obscured somewhat by decisions of the Oklahoma Supreme Court which, while not holding the eminent domain scheme (particularly the immediate-possession provision of § 53(C)) invalid, have broadly stated that "the establishment of the right to condemn is a prerequisite to any right of possession by the Condemnor." *Town of Ames v. Wybrant,* 220 P.2d 693,695 (Okla. 1950) (citing *Watkins v. Board of Comm'rs*, 174 P. 523,525 (Okla. 1918)). However, a wider view of the case law harmonizes

the supreme court's language with its evident acceptance of § 53(C). Thus, the legislative authorization of immediate possession is permissible *in that* such possession *remains subject to review and potential restraint* through the courts' equitable power: "According to *Wybrant*; and *Watkins*, a public body having the power of condemnation *can be enjoined* from appropriating private property for public use until it has initiated condemnation proceedings and had its right to condemn the property finally determined." *City of Bartlesville v. Ambler*, 499 P.2d 433, 436 (Okla. 1971) (emphasis added); *See Wybrant*, 220 P.2d at 696 (noting that "*upon proper application and showing* [by the landowner]" the trial court "*could make an order temporarily restraining* the condemnor from taking possession of the land pending final determination of the right to condemn" (emphasis added)); *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925,933 (Okla. 1935) (same). Indeed, plaintiff has taken the opportunity to seek equitable relief in the state proceedings; he has just not persuaded the Oklahoma courts that it is warranted in his case. Thus, the state courts' construction and assessment of the eminent domain scheme is consistent with applicable federal precedent, and neither of these bodies of authority support plaintiff's position that the Scheme is invalid.

Freedom of Speech

Plaintiff's First Amendment claim, which challenges a collateral order on a basis substantively independent of the condemnation process itself, appears also to fall outside the *Williamson* ripeness bar. *Compare Landmark Land Co. of Okla., Inc, v, Buchanan*, 874 F.2d 717, 723 (10th Cir. 1989) (holding intangible due process right that was substantively distinct from JCC protections was not subsumed under *Williamson* ripeness rule), *with J. B. Ranch. Inc.*, 958 F.2d

at 309 (holding *Williamson* applicable to due process claim that fell squarely within compass of JCC protections). However, we hold that dismissal of the claim was warranted in any event.

The target of the claim is the state trial court's order enjoining plaintiff "from directly or indirectly interfering in any manner with the construction, maintenance and operation of [PSO's] railroad spur." Appellants' Supp. App. at 21. There is nothing facially speech-sensitive about this order, nor does plaintiff cite any authority that would support such a claim. Actually, plaintiff is primarily concerned with a contempt proceeding brought to enforce the injunction after this appeal was filed. In that proceeding, which has not been concluded, PSO seeks to hold plaintiff in contempt for sending a letter to BN admonishing that, in light of the Oklahoma Supreme Court's reversal of PSO's condemnation order, plaintiff "is restoring [his] fence line around [the disputed easement] and posting 'NO TRESPASSING' signs." *Id.* at 22. Whether plaintiff has a cognizable claim under the First Amendment on this basis is not a question properly before this panel.

Trespass

The district court explained that its rejection of plaintiff's constitutional challenges to the eminent domain proceedings mooted any remaining claims and, accordingly, dismissed the entire case. As plaintiff recognizes, his claim against BN for trespass obviously stands or falls with the legitimacy of the eminent domain proceeding from which the railroad derives its status as licensee. Since any further challenges to that proceeding are not currently ripe for adjudication, the district court's dismissal of the action should be affirmed.

State Proceedings - Status Reports

Status reports submitted by plaintiff reflect some unfavorable rulings issued in the ongoing eminent domain proceedings. In particular, plaintiff complains of the Oklahoma Supreme Court's March 22, 1999 denial of his mandamus petition seeking to disqualify the state trial judge, and the May 4, 1999 denial of certiorari in his interlocutory appeal from the trial court's refusal to dissolve the order enjoining interference with PSO's operations. For the same reasons expressed above in connection with plaintiff's challenge to the eminent domain proceeding as a whole, these particular objections to specific rulings therein are not ripe for consideration. Further, if a particular ruling were somehow sufficient to give rise to a distinct, immediately actionable constitutional wrong, at this point such a claim would most appropriately be brought in district court, not interjected into this pre-existing appeal.

Conclusion

Accordingly, we affirm the district court's dismissal of this action. We clarify, however, that the disposition of plaintiff's numerous unripe claims, based on the lack of subject matter jurisdiction, is without prejudice. *See Bateman*, 89 F.3d at 706.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED. All pending motions are denied as moot.

Entered for the Court

Deanell Reece Tacha
Circuit Judge